No. 92-252

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

REGINALD BLEDSOE,
PETITIONER

VS.

THE STATE OF TEXAS,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS, DALLAS, TEXAS

PETITION FOR CERTIORARI

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July 14, 1992

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that probable cause supported the warrantless arrest of Petitioner; in the alternative, did the Court of Appeals err in holding that there were specific articulable facts supporting a brief investigatory detention of the Petitioner?

LIST OF PARTIES

Reginald Bledsoe, Appellant below and Petitioner, herein.

The State of Texas, Appellee below and Respondent, herein.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

LIST OF AUTHORITIES.....iv

OPINION BELOW.....2

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THIS PETITION

I.
THE DALLAS COURT OF APPEALS ERRED IN HOLDING THAT PROBABLE CAUSE EXISTED FOR A WARRANTLESS ARREST OF PETITIONER OR, IN THE ALTERNATIVE THAT REASONABLE GROUNDS EXISTED FOR A BRIEF INVESTIGATORY DETENTION OF THE PETITIONER.....5

CONCLUSION.....10

APPENDIX A [Opinion of the Court of Appeals, Fifth District of Texas, Dallas, Texas].....A1

APPENIDIX B [Order denying Petition for Discretionary Review].....B1

LIST OF AUTHORITIES

CASES:

Adkins v. State, 675 S.W. 2d 604, 608 (Tex. App. - El Paso 1984).....7

Bledsoe v. State, No. 05-90-788-CR (Tex. App. - Dallas Nov. 18, 1991, pet. ref'd).....4

California v. Hodari D., ___U.S. ___, 111 S.Ct 1547, 1551(1991).....6, 8, 9

Terry v. Ohio, 392 U.S.1, 88 S.Ct. 1868 (1968).....7

United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct 1870, 1877 (1980).....6, 8

Whitley v. Warden, 401 U.S. 560, 566 91 S.Ct. 1547, 1551 (1991).....6

STATUTES AND RULES:

28 U.S.C §1257.....2

SUP. CT. R. 13.1.....2

TEX. REV. CIV. STAT and Art. 67.01d, Sec. 107C(b)(1) - (4).....3

Texas State Constitution, Aticle 1, § 9.....3

United States Constitution, Fourth Amend.....2, 3

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIFTH DISTRICT OF TEXAS, DALLAS, TEXAS

PETITION FOR CERTIORARI

Petitioner, Reginald Bledsoe, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals, Fifth District of Texas, Dallas, Texas, entered in the above-entitled proceeding on November 18, 1991.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth District of Texas, was unpublished. A copy of that opinion appears in the Appendix. A petition for discretionary review to the Texas Court of Criminal Appeals was timely filed on January 17, 1992. The Texas Court of Criminal Appeals refused the petition by postcard order on April 15, 1992. A copy of that order also appears in the Appendix; however, no written opinion was issued pursuant to this order.

JURISDICTION

The Court of Appeals, Fifth District of Texas, Dallas, Texas entered an opinion and order affirming Petitioner's conviction on November 18, 1991. Petitioner applied for and received an extension of time to file his petition for discretionary review in the Texas Court of Criminal Appeals. Thereafter, Petitioner timely filed his petition for discretionary review on January 17, 1992. The Court of Criminal Appeals refused the petition on April 15, 1992. Therefore, the petition for writ of certiorari is timely filed on or before July 14, 1992.

The jurisdiction of this Court to review the judgment of the Court of Appeals, Fifth District of Texas, is invoked under 28 U.S.C. Sec. 1257 and SUP. CT. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

TEX. REV. CIV. STAT. and Art. 67.01d, Sec. 107C(b)(1) - (4) (Vernon's Supp 1992) provides as follows:

> A person commits an offense if the person: (1) is at least fifteen years old; (2) is riding in the front seat of a passenger car while the car is being operated on a road, street, or highway of this State; () is occupying a seat that is equipped with a safety belt; and (4) is not secured by a safety belt.

STATEMENT OF THE CASE

In cause number F89-78721-H, pending in the Criminal District Court of Dallas County, Texas, Petitioner was charged by indictment with the offense of possession of cocaine with intent to deliver. Petitioner pleaded not guilty to this indictment and a jury trial was conducted. After the jury found Petitioner guilty as charged, the issue of punishment was submitted to the court. The trial court assessed punishment at twelve years confinement.

Prior to trial, Petitioner filed a motion to suppress evidence, challenging the legality of his warrantless detention and search. This motion invoked the provisions of the Fourth Amendment to the United States Constitution and Article 1, Sec. 9 of the Texas Constitution. The trial court denied the motion to suppress. Petitioner thereafter challenged this ruling on direct appeal to the Court of Appeals, Fifth District of Texas, Dallas, Texas. In its opinion, the Court of Appeals, as is true in most cases involving search and seizure issues, relies upon both State and Federal cases in its opinion.

As noted previously, Petitioner appealed his conviction to

the Court of Appeals, Fifth District of Texas, Dallas, Texas. That court affirmed Petitioner's conviction in *Bledsoe vs. State*, No. 05-90-00788-CR (Tex. App. - Dallas November 18, 1991, pet. ref'd) (unpublished). After receiving an extension of time to file a petition for discretionary review in the Texas Court of Criminal Appeals, Petitioner filed his petition, which was refused on April 15, 1992.

As relevant to this petition, the record reflects the following facts. Officer Standard Hodges and Officer Raymond Hodges (not related), Dallas Police Department Security Officers, were on patrol near an apartment complex in Dallas on February 3, 1989, shortly after one a.m. The officers stopped a vehicle driven by Aaron Turner, in which Petitioner was the only other passenger. The basis for this stop was the vehicle's failure to obey two stop signs.

Officer Standard Hodges approached the passenger side and determined that Petitioner was not wearing his safety belt, a violation of Texas highway laws. He also noticed Petitioner attempting to hide something under his seat. The officer at that time intended to issue Petitioner a citation for the safety belt offense.

When Aaron Turner, the driver, exited the vehicle, Standard Hodges noticed a syringe by Turner's right thigh. Standard Hodges informed the other Officer of this and then ordered Petitioner out of the vehicle at gun point. Shortly after, Petitioner exited the vehicle, he ran from the scene. According to Standard Hodges, Petitioner had not been free to leave the area.

Standard Hodges gave chase on foot, and during the chase, noticed that Petitioner threw something out of his clothing. After doing so, Petitioner fell on the slick street. Standard arrested

Petitioner at that point and then went to retrieve what he assumed was the abandoned object. Standard recovered a baggie of crack cocaine.

During a search of Petitioner's person, Standard Hodges removed a pill bottle which contained a residue of a controlled substance. In the vehicle, the officers found a brown paper bag containing some drug paraphernalia. Additional paraphernalia was found in the trunk of the vehicle which was linked to Aaron Turner, the driver.

On cross-examination, Standard Hodges admitted that, at an earlier suppression hearing, he had testified that he did not notice that Petitioner was not wearing his safety belt until he had approached the suspect vehicle which was by then stopped. Hodges also acknowledged testifying that he could not tell whether Petitioner had his seat belt on while the car was in motion.

REASONS FOR GRANTING THE PETITION

I.

THE DALLAS COURT OF APPEALS ERRED IN HOLDING THAT PROBABLE CAUSE EXISTED FOR A WARRANTLESS ARREST OF PETITIONER OR, IN THE ALTERNATIVE THAT REASONABLE GROUNDS EXISTED FOR A BRIEF INVESTIGATORY DETENTION OF THE PETITIONER.

On appeal, Petitioner argued that he had been placed under arrest by Officer Standard Hodges without probable cause therefor, and the abandonment of the contraband was not voluntarily but was instead a fruit of the illegal seizure. The Court of Appeals rejected this contention, although it appears that the Court found the seizure justified either as an arrest or an investigatory detention.

Petitioner concedes that the stop of the vehicle was lawful because the officers observed two traffic violations. Nevertheless, Petitioner maintains that his detention, be it an arrest or investigatory detention, was unlawful because Officer Standard Hodges had insufficient grounds for the seizure.

Initially, Petitioner maintains that he was in fact under arrest. Officer Standard Hodges ordered Petitioner from the vehicle at gunpoint and later testified that Petitioner was not free to leave the area. The officer's words and actions would have conveyed to a reasonable person that he was under arrest. United *States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877 (1980); *California v. Hodari D.*, ____ U.S. ____, 111 S.Ct. 1547, 1551 (1991).

Standards applicable to the factual basis supporting an officer's probable cause assessment at the time of a challenged warrantless arrest and search are at least as stringent as the standards applied with respect to a Magistrate's assessment as a prelude to issuing an arrest or search warrant. *Whitley v. Warden*, 401 U.S. 560, 566, 91 S.Ct. 1031, 1035 (1971). Officer Standard Hodges' arrest of Petitioner was based upon a violation of a specifically worded highway statute. That a person is not wearing his safety belt after a vehicle is stopped fails to provide probable cause to believe that the person was also not wearing the safety belt while the car was in motion.

By contrast, had the other officer arrested Aaron Turner, the driver, for the same offense, such an arrest would have been lawful. While the vehicle was in motion, Officer Raymond Hodges noticed that the shoulder portion of the safety belt did not appear to have been drawn across the driver's body. This would have provided probable cause for an arrest based upon the safety

belt law; on the otherhand, Officer Standard Hodges could not determine whether Petitioner had been riding without his safety belt or had simply disengaged the safety belt when the vehicle was stopped.

The Court of Appeals attempted to justify the detention on other grounds, notably the discovery of the syringe immediately adjacent to Aaron Turner and Petitioner's furtive gestures. Petitioner first submits that this determination should be disregarded because a reviewing court is limited to the justification for the detention which was submitted to the Magistrate as a basis for detention. *Adkins v. State*, 675 S.W. 2d 604, 608 (Tex. App. - El Paso 1984). Whether at the suppression hearing or at trial, Officer Standard Hodges limited his justification for the arrest solely to the violation of the safety belt laws. In any event, while a syringe was found next to Aaron Turner's person, no similar paraphernalia was found near Petitioner nor was the syringe found in a place within the vehicle which would given rise to probable cause for a belief that either the driver or the passenger had possessed it. Petitioner's furtive gestures alone would not have provided probable cause for the arrest.

This detention cannot be justified alternatively as a brief investigatory detention. An investigatory detention is justified if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encountered has committed some offense. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct 1868 (1968). The only specific, articulable facts offered by Standard Hodges was that Petitioner was not wearing his seat belt after the vehicle had been stopped. No other facts were offered to show a reasonable suspicion that Petitioner had not been wearing his safety belt while the car was in motion.

If the detention was unlawful, then was the subsequent abandonment of the contraband voluntary? Petitioner submits that this Court's recent holding in *California v. Hodari D.*, 111 S.Ct 1547 (1991) does not render Petitioner's subsequent abandonment of the contraband as voluntary. Unlike *Hodari D.*, there was a seizure of Petitioner's person in this case. Officer Standard Hodges ordered Petitioner from the car at gunpoint. This satisfied the objective test of *Mendenhall* that the officer's words and actions would have conveyed to a reasonable person that he was under arrest. 446 U.S. 544, 554; 100 S.Ct 1870, 1877. The more troublesome question becomes whether the arrest "vanished" after Petitioner ran from the scene.

In dictum, this Court in *Hodari D.* stated that if the officer had laid his hands upon Hodari to arrest him, but Hodari had broken away and had then cast away the cocaine, it would hardly be realistic to say that the disclosure had been made during the course of an arrest. 111 S.Ct at 1550. It is not clear from the context, however, whether the Court is referring to a completed arrest or an attempted arrest. In his dissenting opinion, Justice Stevens states:

> "If an officer effects an arrest by touching a citizen, apparently the Court would accept the fact that a seizure ccurred, even if the arrestee should thereafter break loose and flee. In such a case, the constitutionality of the seizure would be evaluated as of the time the officer acted."

111 S.Ct at 1560.

Petitioner thus submits that *Hodari D.* does not hold that an arrest simply vanishes if the suspect later breaks free. An arrest is complete when the officer has applied physical force or the suspect

complete when the officer has applied physical force or the suspect has submitted. The constitutionality of the seizure should be evaluated as of the time the officer acted, regardless of the suspect's later activities.

The deterrent purposes of the exclusionary rule focus on the conduct of law enforcement officers and on discouraging improper behavior on their part, and not on the reaction of the citizen to the show of force. *California v. Hodari D.* 111 S.Ct at 1561 (Stevens, J., dissenting). Once an officer has seized a suspect, the deterrent purposes of the Fourth Amendment are fully applicable, even if the suspect submits only briefly and then flees.

Concerning deterrence, this Court should also note the nature of the safety belt laws at issue here. Although statutes requiring use of safety belts serve a salutary purpose, they also provide the opportunity for a good deal of mischief by officers who wish to detain a person but lack probable cause are articulable facts to do so. As in this case, an officer may notice that a suspect is not wearing his safety belt after the vehicle has been stopped. If this is enough to maintain an investigatory detention or arrest, the officer is virtually free to search the suspect or his vehicle at will. It is extremely doubtful that any of the states passing such laws intended such a broad effect. For this reason as well, Petitioner submits that it would be appropriate for this Court to review the decision in his case.

CONCLUSION

It is respectfully submitted for the reasons outlined above, this Petitioner for writ of certiorari should be granted.

Respectfully submitted,

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THE STATE OF TEXAS,
Plaintiff-Appellee,

v.

Reginald BLEDSOE,
Defendant-Appellant.

No. 05-90-00788-CR

The Court of Appeals
Fifth District of Texas at Dallas.

November 18, 1991

WHITTINGTON, Justice:

A jury convicted Reginald Bledsoe of possession of a controlled substance with intent to deliver. The trial court sentenced him to twelve years' imprisonment. Bledsoe claims that the evidence is insufficient to support his conviction and the prosecutor indulged in improper jury argument. He also claims the trial court erred in: (1) overruling his motion to suppress; (2) admitting evidence of a remote prior conviction; and (3) refusing to submit a jury instruction pursuant to Texas Code of Criminal Procedure article 38.23. We find no merit in these contentions. We affirm the trial court's judgment.

FACTS

Early one morning, Bledsoe was a passenger in a car stopped for traffic violations by the Dallas Police Department security officers. The stop was in a high crime area where there is

much drug activity. One of the officers, Stan Hodges, asked Bledsoe to furnish identification and get out of the car. Bledsoe got out of the car but immediately ran away. The officer followed and caught up with him when Bledsoe slipped and fell. Hodges testified that just before Bledsoe fell he pulled something out of his clothing and threw it out in front of him. After arresting Bledsoe, Hodges retrieved the discarded article which proved to be baggie of crack cocaine.

MOTION TO SUPPRESS

In his first point of error, Bledsoe contends the trial court erred in overruling his motion to suppress evidence. Specifically, he claims his arrest was illegal because the officers had no probable cause to arrest him.

The evidence shows that the officers observed a car run two stop signs and make a turn without signaling. They stopped the vehicle because of these traffic offenses. The initial stop was valid. *See* TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 1977). Hodges testified that according to his responsibility, he watched the passenger very closely as the car was stopped. He then walked to the passenger side of the car as his partner

walked to the driver's side. Hodges testified that neither of the individuals in the car was wearing a seat belt and stated that he intended to give the passenger, later identified as Bledsoe, a citation for that offense. He also observed Bledsoe attempting either to put something under the seat or pull something from beneath the seat. Hodges stated that he repeatedly told Bledsoe to place his hands where the officer could see them but Bledsoe would

not comply. Hodges requested identification from Bledsoe, but Bledsoe did not produce any. Hodges shined his flashlight in the car. When the driver got out of the car, Hodges saw a syringe by the driver's right thigh, within Bledsoe's reach. At Hodges' request, Bledsoe, got out of the car, but immediately ran away. Hodges chased Bledsoe and saw him throw a small object away just before he fell. Hodges retrieved the discarded object which turned out to be a baggie of crack cocaine.

INVESTIGATIVE STOP AND ARREST

Bledsoe focuses his argument on Hodges' intent to give him a citation for the seat belt violation. Bledsoe contends inasmuch as the officer did not notice the violation while the car was in motion,[1] he had no probable cause to issue a citation. Issuing a citation is tantamount to an arrest[2] so there was no probable cause to arrest. He argues that because his arrest was illegal, his abandonment of the cocaine was involuntary. The trial court should have suppressed the evidence. Bledsoe further claims that even if this were a mere investigatory detention, Hodges had no authority to chase him because an individual can choose not to cooperate and merely leave. We disagree.

In a suppression hearing, the trier of fact is the sole judge of the weight and credibility of the witnesses and may believe or disbelieve all or any part of any witness's testimony. *Williams v. State*, 692 S.W.2d 671, 676 (Tex.Crim. App. 1984); *Waller v.*

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[1] TEX.REV.CIV.STAT.ANN. ART. 6701D, SEC. 107C(B) (VERNON SUPP. 1991).
[2] TEX.REV.CIV.STAT.ANN. ART. 6701D, SEC. 148(A) (VERNON SUPP. 1991).

State, 648 S.W.2d 308, 311 (Tex.Crim. App. 1983)(on reh'g). An appellate court must defer to the trial court's findings of fact absent a clear abuse of discretion. *Duff v. State*, 546 S.W.2d 283, 286 (Tex.Crim.App. 1977).

In order to justify a warrantless arrest, the State must show the existence of probable cause at the time the arrest was made and the existence of circumstances which made the procuring of a warrant impracticable. *Smith v. State*, 739 S.W.2d 848, 852 (Tex.Crim. App. 1987). Probable cause for an arrest exists where, at that moment, the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information would warrant a reasonable and prudent person in believing that a particular person has committed or committing a crime. *Id.* On the other hand, an investigative detention need not rise to that level. An investigative detention will be valid if founded upon a reasonable, articulable suspicion that the person detained is connected with criminal activity. *Amores v. State*, No. 0795-89, slip op. at 5 (Tex. Crim. App. Sept. 18, 1991). During an investigative detention the police are allowed to briefly question a suspicious person to determine his identity, his reason for being in the area or location, and to make reasonable inquiries of a truly investigatory nature. *Id.* at 8.

Warrantless seizure of abandoned property is not a constitutional violation. *Garcia v. State*, 704 S.W.2d 512, 516 (Tex. App. - Houston [14th Dist.] 1986, pet. ref'd). Abandonment consists of two components; 1) a defendant must intend to abandon property, and 2) a defendant must freely decide to abandon the property. Abandonment is not voluntary if is due to police

misconduct. *Comer v. State*, 754 S.W.2d 656, 659 (Tex. Crim. App. 1986). The legality of a search of allegedly abandoned evidence, then, will turn on the nexus between the alleged abandonment and the legality of a person's detention. *Hawkins v. State*, 758 S.W.2d 255, 260 (Tex. Crim. App. 1988). We conclude that Hodges initially had sufficient reason to detain Bledsoe and, as a result of Bledsoe's conduct thereafter, had probable cause to arrest him. Bledsoe's abandonment of the cocaine was voluntary.

The initial stop of the car was a lawful stop for traffic offenses. Hodges' knowledge of the area as a high crime area where much drug related activity occurs, combined with his observations of Bledsoe's continued furtive gestures and failure to provide identification, justified a brief detention of Bledsoe for further investigation. *Goodwin v. State*, 799 S.W.2d 719, 727 (Tex. Crim. App. 1990). Hodges was justified in ordering Bledsoe from the car for safety reasons. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977). When Hodges saw the syringe, which was in plain view, he was entitled to conclude from the totality of the circumstances that the occupants of the car were in possession of illegal contraband. That possession of illegal contraband was justification for the arrest.

Since Bledsoe was not in exclusive possession of the contraband, the State must show additional independent facts which affirmatively link him to it. *Guiton v. State*, 679 S.W.2d 66, 69 (Tex. App.--Dallas 1984), *aff'd*, 742 S.W.2d 5 (Tex. Crim. App. 1987). Facts surrounding a search and arrest which link an accused to contraband include whether the contraband was in plain view, *Hughes v. State*, 612 S.W.2d 521, 582 (Tex. Crim. App.

[Panel Op.] 1981); whether the drugs were conveniently accessible to the accused. *Guiton*, 742 S.W.2d at 8; whether other drugs or drug paraphernalia not included in the charge where present, *Earvin v. State*, 632 S.W.2d 920, 925 (Tex. App.--Dallas 1982, pet. ref'd); whether the accused fled the scene, *Chavez v. State*, 769 S.W.2d 284, 288 (Tex. App.--Houston [1st Dist.] 1989, pet. ref'd); and whether the accused made furtive gestures, *Guiton*, 742 S.W.2d at 9. Evidence reveals these links between Bledsoe and the syringe and show him at least to have joint possession of the syringe. Bledsoe was properly subject to arrest at this point, and Hodges was justified in pursuing him when he fled. There being no police misconduct, Bledsoe's abandonment of the contraband was voluntary. We hold that there was no abuse of discretion on the part of the trial court in overruling Bledsoe's motion to suppress evidence and overrule point of error one.

PRIOR CONVICTIONS

In his second point of error, Bledsoe asserts that he was improperly impeached through the use of remote prior convictions in violation of Texas Rule of Criminal Evidence 609(b). In front of the jury Bledsoe admitted to his prior conviction on June 10, 1980 for burglary of a building; on June 16, 1980 for fraudulent removal of a writing and on November 4, 1985 for theft of property over $200.00 but less than $750. On appeal, Bledsoe only contests admission of the burglary conviction, in which he pleaded guilty and received probation.

Under rule 609(b), evidence of a prior conviction is not admissible for impeachment if more than ten years has elapsed since the date of the witness's conviction or release, whichever is

later, unless the court determines, in the interest of justice, that the probative value of the conviction substantially outweighs its prejudicial effect. TEX. R. CIV. EVID. 609(b). At trial, the State argued that the burglary conviction was admissible under rule 609(c). The State's position is that proof of the burglary conviction, although remote, is admissible because of the later theft conviction, a crime involving moral turpitude.

STANDARD OF REVIEW

The question of remoteness has been held to largely be a matter within the sound discretion of the trial court although the general rule, and now rule 609, provides that if the release from confinement, or the date of conviction, is less than ten years prior, the conviction may routinely be admitted for impeachment purposes. TEX. R. CRIM. EVID. 609; *Husting v. State*, 790 S.W. 2d 121, 126 (Tex. App. - San Antonio 1990, no pet.). In determining whether the trial court abused its discretion we look to the totality of circumstances. *Lucas v. State*, 791 S.W. 2d 35, 51 (Tex. Crim. App. 1989). Particularly, we consider evidence of lack of reformation, intervening felony conviction or conviction for a crime involving moral turpitude as circumstances which overcome the remoteness objection. *Husting*, 790 S.W.2d at 126. In our case, the State provided evidence of two intervening misdemeanor convictions, one of which involved moral turpitude. We note also that the conviction now challenged as "remote" missed the ten-year guideline by five days. We conclude that with the evidence of a lack of reformation, the burglary conviction is admissible for impeachment. The trial court did not abuse its discretion and we overrule point of error two.

JURY ARGUMENT

In his third point of error, Bledsoe claims the trial court erred in overruling his objection to improper jury argument. In arguing during the guilt-innocence phase of the trial the prosecutor stated:

> Second thing I'd like to respond to is as I know that as reasonable jurors and you have watched myself and [co-counsel] during the trial, you know that I'm just going to run out and risk my job as a prosecutor to fabricate testimony. I know that y'all know I would do that especially in this trial.

Bledsoe objected, claiming the argument constituted bolstering of the State's witnesses' credibility. His objection was overruled.

Jury arguments need to be within the areas of: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; or (4) plea for law enforcement. *Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973).

Here, Bledsoe's counsel argued that Hodges fabricated most of his testimony to cover up the fact that, without provocation, he beat Bledsoe. Counsel also stated that the prosecutor "refreshed" another officer's memory prior to his testimony. The insinuation being that the prosecutor told both officers what to say on the stand. We hold that the prosecutor's comment did not constitute improper jury argument but was, instead, merely an answer to argument of opposing counsel. *See Chapman v. State*, 503 S.W.2d 237, 238 (Tex. Crim. App. 1974). We overrule point of error .

three.

REFUSED INSTRUCTION

In point of error four, Bledsoe claims the trial court erred in refusing to submit an instruction on illegally seized evidence pursuant to Texas Code of criminal Procedure article 38.23. Bledsoe tendered his own requested instruction which the trial court declined to submit. The trial court then proposed its own version of that instruction, which Bledsoe objected to. The trial court then omitted any instruction on that point. Article 38.23 states in pertinent part:

> (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or law of the State of Texas, or of the Constitution or law of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 1991). When the evidence presented to the jury raises a fact issue regarding the legality of its acquisition the instruction is mandatory. Bledsoe's requested charge stated:

> You are instructed that under our law no evidence obtained or derived by an officer or other person

as a result of an unlawful arrest and search of an accused shall be admissible in evidence against the accused. An officer is permitted, however, to make an arrest if he observes a person committing a traffic offense other than speeding. Now, bearing in mind these instructions, if you find and believe from the evidence that on the occasion in question, that the arresting officer did not have sufficient facts before him to conclude that the Defendant, Reginald Bledsoe, was not wearing his seat belt, as required by law, or if you have a reasonable doubt thereof, then the arrest of the said Defendant would be illegal, and if you find the facts so to be, or if you have a reasonable doubt thereof, you will disregard the testimony of the officer relative to his arrest and search of the said Defendant, and any evidence derived therefrom, and you will not consider such evidence for any purpose whatsoever.

The court's proposed charged stated:

You are instructed that under our law no evidence obtained or derived y an officer or other person as a result of an unlawful arrest and search of an accused shall be admissible in evidence against the accused. An officer is permitted, however, to stop a vehicle if he observes the driver of a vehicle commit an offense against the law of this state or has probable cause to believe that an offense is being committed. Running a stop sign, failure to signal intention to turn and failure of front seat occupants to wear a seat belt and possession of narcotics paraphernalia are offenses against the law of this state. Once a stop of a vehicle is made under these circumstances, an officer has a right to detain for further investigation and a right to protect himself and his fellow officers from any danger to the life or safety of such officers.

> Now bearing in mind these instructions, if you find and believe from the evidence that on the occasion in question the officers Hodges (either of them) did not observe the commission of an offense against the laws of this state, or have probable cause to believe that an offense was being committed, or if you have a reasonable doubt thereof, then you will disregard any testimony about what occurred after the vehicle was stopped, including any evidence derived therefrom and acquit the Defendant saying by your verdict "not guilty."

The evidence in our case raises a fact question as to the legality of the police officers' acquisition of evidence, accordingly, the instruction should have been given. However, we hold that Bledsoe invited the error. Bledsoe properly submitted the instruction, requesting the inclusion in the charge, thus originally preserving his complaint. Thereafter, he objected to the court's offered proper instruction on the point. He cannot now be heard to complain that the proper instruction was not given. *Smith v. State*, 635 S.W.2d 591, 592-93 (Tex. App. - Dallas 1982, no pet.); *United States v. Enstam*, 622 F.2d 857, 866 (5th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). We overrule on point of error four.

VARIANCE FROM INDICTMENT

In his fifth point of error, Bledsoe claims there is a fatal variance between the indictment and the proof adduced at trial. The indictment charged Bledsoe with possession with intent to deliver cocaine "in an amount by aggregate weight including any adulterants or dilutants of 28 grams or more but less than 200 grams." Ann Weaver, the chemist who testified for the State,

analyzed the substance in the baggie which Bledsoe threw to the ground while running away. She stated that the total weight of the hard material in the baggie was 50.72 grams and the amount of cocaine found in the baggie was 45.28 grams. In other words, 89% of the total weight was pure cocaine. In a unique argument, Bledsoe contends that the State failed to meet its burden in proving the charge in the indictment because its witness did not specifically state that the balance of the material recovered constituted an adulterant or dilutant. He asserts that the State failed to prove the amount and existence of adulterants or dilutants in the substance found in the baggie. The record shows:

> State: Okay. Is the amount that you found and analyzed and I believe you testified to 50.72 grams, correct?
>
> Weaver: That's correct.
>
> State: Is that an accurate amount including any adulterants or diluents (sic) of greater than 28 grams and less than 200 grams?
>
> Weaver: It is an amount that is greater than 28 grams and less than 200.

The prosecutor then asked Weaver to explain what adulterants and dilutants are.

Any factfinder could reasonably deduce from the above testimony that: (1) the total quantity of the substances in the baggie was 50.72 grams; 2) the amount of cocaine was 45.28 grams; and (3) the remainder of the substance which was not

cocaine was adulterants and dilutants. *See Benavides v. State*, 763 S.W. 2d 587, 588-89 (Tex. App. - Corpus Christi 1988. pet. ref'd). The State proved possession of *pure* cocaine in an amount greater than the minimum alleged in the indictment, which, by terms of the statute and the indictmemt, could include adulterants and dilutants. *See* Acts of June 17, 1983, 68th Leg., R.S., ch. 425, Sec. 13(1), 1989 Tex. Gen. Laws 2230, 31165 (current version at TEX. HEALTH & SAFETY CODE ANN. Sec. 481.112(a) (Vernon Pamph. 1991).

The Texas Court of Criminal Appeals has held that:

> [W]here the State attempts to obtain a conviction for an aggravated offense under the theory that the aggregate weight of the controlled substance, including adulterants or dilutants, is over 28 grams, the State first must prove the existence of any adulterants or dilutants, i.e., compounds, substances, or solutions added to the controlled substance to increase the bulk or quantity of the final product. The State must then show that the controlled substance, plus any adulterants or dilutants, if proven to exist, weighs more than 28 grams.

Reeves v. State, 806 S.W. 2d 540, 542 (Tex. Crim. App. 1990). The critical evidence is that which proves the quantity of contraband as being 28 grams or more and that the substance included cocaine. TEX. HEALTH & SAFETY CODE ANN. Sec. 481.112(a) (Vernon Pamph. 1991). The evidence shows that Bledsoe possessed a substance totalling 50.72 grams, 45.28 grams of which was pure cocaine. We hold that there was no variance between the indictment and the evidence. We overrule point of

error five.

INTENT TO DELIVER

In his final point of error, Bledsoe contends the evidence is insufficient to prove that he possessed the cocaine with the intent to deliver. We look at all of the evidence in the light most favorable to the judgment. We determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Houston v. State*, 663 S.W. 2d 455, 456 (Tex. Crim. App. 1984). Intent to deliver may be shown by circumstantial evidence, such as the quantity of drug possessed, the manner of packaging and evidence of drug transactions. *Smith v. State*, 737 S.W. 2d 933, 941 (Tex. App. - Dallas 1987, pet. ref'd).

The evidence shows that Bledsoe possessed a controlled substance in the amount of 50.72 grams. An officer with the Dallas Police stated that amount is more than one person would use. A brown bag containing 400 plastic baggies, a gold spoon, razor blades, a cigarette lighter, a scale and a calculator was found stuffed in or under the front seat between the driver's seat and the passenger's seat. This bag was located within Bledsoe's reach and in the area where he was making gestures as if pushing something under the seat or removing something from under the seat. Witnesses testified that small baggies such as those found in the brown bag are commonly used to package small rocks of crack cocaine for sale. The officer explained how each of the items in the brown bag are used as drug paraphernalia. Particularly, the razor blades are used to cut small portions off the large rock of cocaine. The scales are used to weight the portions. Each small

rock is placed in a small ziplock baggie for sale. Officer Hodges testified that the driver said the brown bag and its contents belonged to Bledsoe. While this constitutes hearsay, we will consider it since it was not objected to. TEX. R. CRIM. EVID.. 802; *Harris v. State*, 727 S.W. 2d 537, 541 (Tex. Crim. App. 1987). Viewing the totality of the evidence, we hold that a rational trier of fact could have found the essential elements of the offense of possession of cocaine with the intent to deliver. We overrule Bledsoe's point of error six. We affirm the trial court's judgment.

/s/ JOHN WHITTINGTON
JUSTICE

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April 15, 1992

COA#: 05-90-00788-CR

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

APPENDIX B - 1